128 of June 14, 1912 [41 L. D., 89], can be followed in dealing with the act of August 24, 1912 (37 Stat., 496), with such changes as the nature of the act would necessitate, such as substituting the word "oil" for "coal", and changing the endorsement required by paragraph 7 to relate to the act of August 24, 1912 (37 Stat., 496).

You will observe that the provision of the act of June 22, 1910, *supra*, that—

> homestead entries made hereunder shall be subject to the conditions, as to residence and cultivation, of entries under the act approved February nineteenth, nineteen hundred and nine, entitled "An act to provide for an enlarged homestead,"

is omitted from the act under consideration. Homestead entries for oil and gas lands in Utah, therefore, are subject to all of the provisions of the act of June 6, 1912 (37 Stat., 123).

You will also notice particularly the last sentence of the act of August 24, 1912 (37 Stat., 496), to wit: "The reserved oil and gas deposits in such lands shall be disposed of only as shall be hereafter expressly directed by law." No prospecting on such lands can, therefore, be initiated until there is some legislation providing for the disposal of oil and gas deposits therein.

At the same time bear in mind that the act contains no provision for the presentation of applications to locate, enter or select, under land laws of the United States, lands which have been withdrawn as valuable for petroleum, with a view of proving that the lands are not valuable therefor and securing a patent without reservations.

Very respectfully,

JOHN MCPHAUL,
Acting Assistant Commissioner.

Approved:
SAMUEL ADAMS,
First Assistant Secretary.

BENNETT ET AL. v. MOLL.

Decided December 19, 1912.

MINERAL LAND—DEPOSITS OF PUMICE OR VOLCANIC ASH.

Land of little value for agricultural purposes, but which contains extensive deposits of finely divided pumice or volcanic ash, suitable for use in the manufacture of roofing materials and abrasive soaps, and having a positive commercial value for such purposes, is mineral land and not subject to disposition under the agricultural laws.

ADAMS, *First Assistant Secretary:*

John P. Bennett *et al.* have appealed from the Commissioner's decision of May 12, 1911, dismissing their protest against the home-

stead entry 06390 of Frank J. Moll for the N. ½ SW. ¼, S. ½ NW. ¼, Sec. 14, T. 10 N., R. 51 W., Sterling land district, Colorado.

The entry was made March 22, 1909. January 19, 1910, John P. Bennett, Joseph Bennett, and W. H. Bennett filed application for patent 010555 to the Base Bullion placer mining claim, embracing a portion of the land covered by said entry, to wit, the S. ½ SW. ¼ NW. ¼, W. ½ SE. ¼ NW. ¼, NE ¼ NW. ¼ SW. ¼ and NW. ¼, NE. ¼ SW. ¼ of said section 14. This application was, at the time of its presentation, suspended by the local officers because of its conflict with the homestead entry.

January 31, 1910, the above mentioned protest was filed. It is sworn to by John P. Bennett, on behalf of himself and his coclaimants of the Base Bullion mining claim, and charges, in substance and effect, that said claim was originally located May 21, 1903, and was relocated by them December 14, 1907; that the ground embraced therein is mineral in character and more valuable for mineral than for agricultural purposes, and was so known by the homesteader at the date of said entry; that it contains a large bed of mineral known as "silica" of which the protestants have shipped large quantities; that the boundaries of said mining claim are plainly monumented on the ground and that the homesteader wrongfully and fraudulently sought to embrace the same in his entry.

After due notice, hearing was had on the protest May 22, 1910, resulting in a finding by the local officers that the land is chiefly valuable for agricultural purposes and that the allegations of the protest were not sustained; they recommend, therefore, that the protest be dismissed. On appeal, the Commissioner, in the decision here appealed from, found and held that the land contains nothing in the shape of mineral save a deposit of sand; that—

> No special value of this sand over other sand deposits is shown by the evidence, and in view of the fact that deposits of sand occur with considerable frequency in the public domain indicates that such deposits, unless they possess a peculiar property or characteristic giving them a special value, are not to be regarded as mineral. See case of Zimmerman *v.* Brunson (39 L. D., 310). Therefore, it is adjudged that contestants have not shown a discovery of mineral upon said land, or that they have a valid mining claim thereon, or that the land is mineral in character.

The action of the local officers was accordingly affirmed and the protest dismissed. The Commissioner further held the mineral application of protestants for rejection.

The evidence adduced on the part of the protestants shows that the particular area involved in the protest is generally rough and traversed by draws; that the surface thereof is gravelly and only a small portion susceptible of cultivation to crops; that nothing has ever been grown thereon save buffalo grass and weeds, insufficient in quantity to support a steer for a year. Underlying the surface

gravel, whose maximum thickness does not exceed twenty-eight inches, there has been disclosed throughout the entire area a deposit of what protestants and their witnesses denominate "silica," which, it is testified, was analyzed and found to contain 95% silica and 5% magnesia. This deposit is shown to be at least thirty-five feet thick throughout practically the entire area. From February 20, 1908, to November 8, 1909, nine car loads of this material of the total weight of 294 tons, were shipped by the mineral claimants to the Western Elaterite Company of Denver, the Chicago Asbestos Company of Chicago, the Elaterite Roofing Company of Denver, the Michael Heating Company of Denver and the Haskins Brothers Soap Company of Omaha. The earlier shipments brought a price of $1.75 per ton f. o. b. cars near the land, but later shipments were made at the price of $2.25 per ton. One of the protestants testifies that, at the date of the hearing, he had an order for another car load of the material. The use to which the substance has been put is not disclosed by the record and can only be surmised from the names of the companies to which it has been shipped. It is fair to assume, however, that it is suitable for use in the preparation of roofing materials and in the manufacture of abrasive soaps. A sample of the substance was submitted in evidence. The protestants testified that it is "silica" and the Commissioner refers to it merely as "sand." A microscopic examination of the same, however, shows that it is not silica or, in the proper sense of the term, sand, but a finely divided pumice or volcanic ash, which is a silicate and not silica. But, for the purpose of the determination of this case, it is immaterial whether it is "silica" or pumice. It is clearly a mineral substance and, moreover, possesses a positive commercial value, as is evidenced by the fact, as testified by the protestants, and not denied, that it brings a price of $1.75 to $2.25 per ton f. o. b. cars at the railroad station or siding nearest the land. That material of this nature possesses a commercial value is further shown by reference to Part II, Mineral Resources of the United States for the Calendar year 1910, published by the United States Geological Survey, wherein, at page 695, it is stated that, during the years from 1906 to 1910, inclusive, 69,257 tons of pumice of the total value of $218,237 was produced in the United States, principally from the same section of the country in which the land here in question is situated. On the same page of said publication, it is said, with reference to that industry: "The business is reported good and the returns show a more prosperous condition in the industry than ever previously reported by the Geological Survey." It is testified by protestants, and not denied, that the particular area here in controversy is rough and broken and that the surface is generally of a gravelly nature. One

of the protestants testifies that not to exceed 10 acres, in small disconnected patches, are susceptible of cultivation, and one of their witnesses testifies that from 15 to 20 acres thereof can not be cultivated. Witnesses for the protestee, while giving it as their opinion that the land embraced in the homestead entry generally is worth from $25 to $30 per acre, for agricultural purposes, make no specific reference to the particular area here in controversy. No attempt is made on behalf of the protestee to show that any crop, except possibly grass, can be produced from the area in question. Under all the circumstances of the case, the Department is convinced that the land is essentially mineral land, and hence not subject to disposition under the agricultural laws.

The decision of the Commissioner is, therefore, reversed and the homestead entry will be canceled, to the extent of the area in conflict, and, in the absence of other objection, the mineral claimants will be permitted, after due publication and posting, as required by the statutes, to proceed with proof upon their pending application.

The cancellation of the homestead entry, as to the area in conflict, will render the N. ½ of the SW. ¼ of the NW. ¼ noncontiguous to the other portion of the entry. The homesteader will, therefore, be called upon to show cause why the entry should not also be canceled, as to said noncontiguous tract.

BENNETT ET AL. v. MOLL.

Motion for rehearing of departmental decision of December 19, 1912, 41 L. D., 584, denied by First Assistant Secretary Adams, April 22, 1913.

ALLEN v. FLEMING.

Decided January 10, 1913.

ISOLATED TRACT—NOTICE OF OFFERING.

Under the act of June 27, 1906, the publication of notice for at least thirty days preceding the date of offering for sale of an isolated tract is essential to the jurisdiction of the local officers to make the sale; and a sale made on a publication of less than thirty days is invalid and can not stand.

JURISDICTION OF LOCAL OFFICERS—REPUBLICATION AND REOFFERING.

An order by the Commissioner of the General Land Office to sell an isolated tract contemplates the offering of the land for sale after legal notice has been given, and where, after offering and accepting a bid for the land, the local officers discover that the notice of sale was defective, they have jurisdiction, without further order from the Commissioner, to direct republication of notice and to reoffer and sell the land in accordance therewith.